

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re: Dairy Farmers of America, Inc.)	Master File No. 09-cv-03690
Cheese Antitrust Litigation)	MDL No. 2031
)	Judge William J. Hibbler
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THIS DOCUMENT RELATES TO:)	DEFENDANTS FRANK OTIS AND GLENN MILLAR'S MOTION TO DISMISS THE DIRECT PURCHASER PLAINTIFFS' CORRECTED CONSOLIDATED AMENDED COMPLAINT
DIRECT PURCHASER ACTION)	
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Defendants Frank Otis and Glenn Millar respectfully move to dismiss the Direct Purchaser Plaintiffs' Corrected Consolidated Amended Complaint ("Complaint"), pursuant to Federal Rule of Procedure 12(b)(6), for failure to state a claim. In support of this Motion, Defendants Otis and Millar state as follows:

1. Defendants Otis and Millar join the Motion to Dismiss being filed this day by Defendants Gary Hanman and Gerald Bos and their Memorandum in Support of that Motion, which explains why Counts One, Two and Three of the Complaint, which assert antitrust claims under the Sherman Antitrust Act, should be dismissed as to Defendants Hanman, Bos, Otis and Millar (the "Individual Defendants").
2. Defendants Otis and Millar join the Partial Motion to Dismiss being filed this day by Defendants Dairy Farmers of America, Inc. ("DFA") and Keller's Creamery, LP ("Keller's"), which explains why Counts Four and Five of the Complaint, which assert claims under the Commodity Exchange Act and claims for unjust enrichment, should be dismissed as to all

Defendants and which provides additional grounds for dismissal of Claims One, Two and Three of the Complaint as to all Defendants.

3. Defendants Otis and Millar are submitting a Memorandum in Support of their Motion to Dismiss Count Six of the Complaint, which asserts claims under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §1962 (“RICO”). For the reasons set forth in more detail in that Memorandum, the RICO claims against all Defendants must be dismissed with prejudice, because:

a. Plaintiffs have failed to define a RICO “enterprise” that had any structure or hierarchy. Plaintiffs failed to allege any chain of command or any breakdown of the alleged “enterprise” members’ responsibilities. Instead, Plaintiffs name as an “enterprise” only a string of entities allegedly operated in concert, which does not state a claim for relief under RICO.

b. Plaintiffs have failed to properly plead that the Defendants engaged in “racketeering activity” of a nature required by the RICO statute. Plaintiffs unsuccessfully attempt to allege a market manipulation antitrust theory and fit it into the constraints of a RICO cause of action. However, alleged antitrust violations are not requisite racketeering activity under RICO. Plaintiffs’ attempts to plead mail and wire fraud as predicate acts also fail, because they lack the requisite specificity. Therefore, Plaintiffs failed to plead racketeering activity as required under RICO.

c. Plaintiffs have failed to plead a “pattern” of racketeering activity that posed the kind of threat of continuing criminal behavior that RICO requires. Plaintiffs claim that Defendants’ trading activity would have continued if the CFTC had not begun an investigation. However, Plaintiffs fail to allege any facts supporting this allegation, or explain how a threat of

repetition exists given that Plaintiffs have alleged a natural ending to Defendants' alleged market manipulation in June 2004, months before the CFTC investigation began.

4. Plaintiffs have failed to state a RICO claim upon which relief can be granted.

WHEREFORE, Defendants Frank Otis and Glenn Millar respectfully request that this Court dismiss with prejudice the Complaint and all claims therein against Defendants Otis and Millar.

Dated: May 19, 2010

Respectfully submitted,

/s/ Steven M. Kowal

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**ATTORNEYS FOR DEFENDANTS
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Defendants' Motion to Dismiss the Direct Purchaser Plaintiffs' Corrected Consolidated Amended Complaint was provided to all counsel of record pursuant to the ECF as to Filing Users on May 19, 2010. I also served the foregoing documents via U.S. Mail on the following counsel:

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/s/ Michelle S. Taylor

Attorney for Defendants Frank Otis and Glenn
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